To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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ARLENE ARNOLD, as Administratrix of the Estate of JA-JA ARNOLD, Deceased, and ARLENE ARNOLD, Individually,

Plaintiffs,

-against-

GREG LANIER, CHHAYA AGGARWAL-GUPTA, WESTCHESTER HEART AND VASCULAR, WESTCHESTER COUNTY HEALTH CARE CORPORATION, ABBOTT LABORATORIES and ST. JUDE MEDICAL, LLC,

Defendants.

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DECISION & ORDER

Index No. 70004/2018
Motion Seq. No. 9

LEFKOWITZ, J.

The following papers were read on plaintiffs' motion for an order pursuant to CPLR 3124 compelling nonparty Abbott Laboratories (hereinafter Abbott) to provide plaintiffs with copies of the PPE Group Report, the PEC Complaint, and the log files from the decedent's HeartMate II Left Ventricular Assist Device.

Notice of Motion - Plaintiffs' Affirmation in Support - Exhibits
Memorandum of Law in Opposition - Exhibits[1]
Affirmation in Reply - Exhibit
Affidavits of Service

Upon the foregoing papers, this motion is determined as follows:

Plaintiffs commenced this action alleging medical malpractice and wrongful death pertaining to care and treatment rendered to Ja-Ja Arnold at Westchester Medical Center

[1] The memorandum of law in opposition and exhibits were incorrectly filed as Motion #3 (NYSCEF doc #162-169). Plaintiffs' counsel then improperly submitted an "Affirmation in Reply" and an "Affirmation in Opposition to Cross-Motion (Motion #3)." This Court declines to consider plaintiffs' second set of reply papers (NYSCEF doc #173-175).

(hereinafter WMC) in December 2017. Mr. Arnold had a HeartMate II Left Ventricular Assist Device implanted in his chest on August 30, 2013. Plaintiffs allege that in the months leading up to December 19, 2017 the pump failure alarm on the device was triggered four to five times. On December 19, 2017, Mr. Arnold presented to WMC with mild redness and swelling around the HeartMate II LVAD driveline. He was admitted to WMC. On December 20, 2017, two repair technicians employed by Abbott allegedly replaced the HeartMate II LVAD percutaneous lead on Mr. Arnold's device at the direction of WMC employees. Plaintiffs allege that on December 21, 2017, Mr. Arnold became unresponsive and went into ventricular fibrillation. Attempts to defibrillate Mr. Arnold failed and he died on the same date.

Following defendants' depositions and the depositions of the witnesses produced by Abbott, plaintiffs served all counsel, including counsel for former defendant Abbott, with a letter stating the circumstances and reasons the discovery is sought together with a subpoena seeking the following documents:

i. Complete original copy of the PPE group full report of the HeartMate II left ventricular assist device (LVAD) relating to Ja-Ja Arnold.
ii. Complete original copy of the PEC Complaint of the HeartMate II left ventricular assist device (LVAD) relating to Ja-Ja Arnold.
iii. Complete original copy of the log files of the HeartMate II left ventricular assist device (LVAD) relating to Ja-Ja Arnold (Plaintiffs' Exhibit 5).[2]

Abbott was served with the subpoena, as its counsel was served with the subpoena by NYSCEF and she submitted opposition to this motion on behalf of Abbott. Plaintiffs now seek an order compelling nonparty Abbott, the manufacturer of the HeartMate II LVAD, to provide the documents at issue, arguing the treatment rendered to Mr. Arnold was at least in part determined based on the data and information Abbott made available to medical personnel at WMC. This information was allegedly relied on by WMC when providing care and treatment to Mr. Arnold. In opposition, Abbott argues they were previously dismissed from this case. Abbott contends that the only Abbott documents arguably relevant to the case are the documents the WMC defendants considered to determine Mr. Arnold's treatment during the subject admission, which are maintained by WMC.

Here, plaintiffs seek discovery from a nonparty. To obtain nonparty discovery, a party must serve the nonparty with a subpoena stating the circumstances or reasons why the nonparty disclosure is sought or required, and show that the nonparty discovery is material and necessary to the prosecution or defense of the action (CPLR §§ 3106[b]; 3101[a][4]; *Alumil Fabrication, Inc. v F.A. Alpine Window Mfg. Corp.*, 151 AD3d 667 [2d Dept 2017]). A party or nonparty seeking to quash a subpoena has the initial burden of demonstrating the subpoena should be vacated under the circumstances (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]). A nonparty subpoena should be quashed "where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is 'utterly irrelevant to any proper

[2] Plaintiffs argue the only log files produced to date are from December 20, 2017 and December 21, 2017 (NYSCEF doc #114).

inquiry'" (*Matter of Kapon v Koch*, 23 NY3d 32 [2014]; *Lima v Ancona*, 192 AD3d 1093 [2d Dept 2021]; *Ferolito v Arizon Beverages USA*, 2014 NY Slip Op 5153 [2d Dept 2014]). Should the movant meet this burden, the subpoenaing party must demonstrate that the discovery sought is material and necessary to the prosecution or defense of the action (*Lima v Ancona*, 192 AD3d 1093 [2d Dept 2021]).

Dr. Aggarwal-Gupta testified that Mr. Arnold was admitted with a pump stoppage in 2017, his LVAD was interrogated, and it was found that his pump had stopped four or five times at home since his last outpatient visit and he failed to inform them (Plaintiffs' Exhibit 1, p. 79-80, 83). Dr. Aggarwal-Gupta testified that there was no pump malfunction in the hospital (Plaintiffs' Exhibit 1, p. 122). When an LVAD device is interrogated it is hooked up to a monitor to look at the history of alarms and it will indicate if there was a low flow alarm or a low battery alarm. Dr. Aggarwal testified that she has never printed out this information. It can be put on a USB drive and sent to the company if they do not know why the alarm is happening (Plaintiffs' Exhibit 1, p. 29-30). Dr. Aggarwal-Gupta then testified that if interventions are done and they do not address the alarm, they would put the log files, which are a history of all the alarms and other information from the pump, on a USB drive, then send it via computer to the company. Within twenty four hours they get a response back from the company, stating the possible reason or reasons to consider (Plaintiffs' Exhibit 1, p. 36-37). Dr. Aggarwal-Gupta testified that after Mr. Arnold presented to WMC, they sent the log files to the company because they were not sure if it was an issue with the pump or the driveline (Plaintiffs' Exhibit 1, p. 80). She testified that if they submit the log files, they get a formal report back (Plaintiffs' Exhibit 1, p. 129).

Dr. Gregg Lanier testified that at least one of the physician assistants or nurse practitioners sent information about Mr. Arnold's log files for the HeartMate II LVAD to biomechanical engineers at the manufacturer of the HeartMate II LVAD and they received a response by phone or email (Plaintiffs' Exhibit 2, p. 88-89). Dr. Lanier testified that when they sent the information about how the pump was functioning on the day Mr. Arnold died, he was told that there was no evidence of pump malfunction (Plaintiffs' Exhibit 2, p. 146). Bruce Horton, an employee of Abbott in technical service, testified that the log files can provide information as to what problems the device may be having. The log files are "the data entry that's recorded off of what the pump is running. It records what the pump is doing" (Plaintiffs' Exhibit 3, p.7, 18-19).

In reply, plaintiffs submit a December 18, 2017 email from a physician assistant at Westchester Heart and Vascular to Abbott, stating "Logfiles jaja a… Low flow alarms, asymptomatic. Multiple PI events." Abbott sent a responsive email on the same date, providing a summary of the HM2 log file submitted, and stating "[t]he data showed 7 pump stops on 12/15/17. This type of behavior has been linked to potential issues with the percutaneous lead… In order for us to identify a possible location of where the compromise in the lead is, x-rays will be needed. These x-rays should show the entire percutaneous lead from its connection to the controller where it attaches to the VAD with as few twists/turns to the driveline as possible…" (Plaintiffs' Reply, Exhibit 1).

This Court finds that all log files sent in December 2017 from Westchester Heart and Vascular or WMC to Abbott related to Mr. Arnold's HeartMate II LVAD are relevant to the

claims against the remaining defendants in this matter. The log files are relevant to the issues of when the LVAD alarm went off, what type of alarm went off, what information may have been available when the LVAD was interrogated, and whether the pump was properly functioning during the hospital admission at issue. Insofar as plaintiffs seek all log files for Mr. Arnold's HeartMate II LVAD for an unlimited period of time, this request is denied. The device was implanted in 2013 and the facts and allegations in this matter are limited to December 2017 (NYSCEF doc #52, Amended Complaint).

Mr. Horton further testified that in this case, he remembers reading the x-ray and seeing the PEC. The PEC is the complaint written by Abbott when a patient has an issue, then Abbott adds the documentation it reviewed to the complaint (Plaintiffs' Exhibit 3, p. 44, 50). Mr. Horton testified that if a patient had pump stops, a person reads the log files and replies, attaches the log file data in the reply email, asks for x-rays, attaches the x-rays, and repair data is added to the complaint (Plaintiffs' Exhibit 3, p. 50-52). He testified that after a repair, "[the complaint] goes to a different group that reviews all of it and they come up with a full report to give to the hospital." The PPE group in Burlington, Massachusetts prepares a report for the hospital (Plaintiffs' Exhibit 3, p. 53). Furthermore, Abbott submits an August 19, 2021 email from Abbott's counsel, stating x-rays were received from the hospital and communications with the hospital may be part of the PEC complaint (Abbott's Opposition, Exhibit G, p. 2, 3).

This Court finds that the PEC Complaint and the PPE Group Report prepared by Abbott pertaining to Mr. Arnold's December 2017 treatment are relevant to the claims against the remaining defendants in this matter. The PEC Complaint and the PPE Group Report are relevant to the issues of what information defendants sent to Abbott on a UBS drive and after the UBS drive was sent, what information Abbott sent to defendants in response, and the timing of these communications. The PPE Group Report may also contain information regarding the repair, information regarding the percutaneous lead that was replaced, and communications after the repair and before Mr. Arnold died. These documents likely contain information regarding Mr. Arnold's course of treatment and communications sent and received by the remaining defendants that are not contained in the hospital chart.

In view of the foregoing, it is

ORDERED that plaintiffs' motion for an order compelling nonparty Abbott Laboratories to provide discovery is granted to the extent that Abbott shall provide on or before December 8, 2021 all log files sent in December 2017 from Westchester Heart and Vascular or WMC to Abbott related Mr. Arnold's HeartMate II LVAD; and it is further

ORDERED that Abbott Laboratories shall provide on or before December 8, 2021 the complete PEC Complaint and the complete PPE Group Report prepared by Abbott Laboratories pertaining to Mr. Arnold's December 2017 treatment; and it is further

ORDERED that all parties are directed to appear for a final compliance conference on December 15, 2021 at 10 a.m., or as the Court shall otherwise direct. The parties will be contacted by the Court with further instructions concerning this appearance. The Court

anticipates that all discovery will be completed by December 15, 2021 and a Trial Readiness Order will be issued on that date; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within seven (7) days of entry. Plaintiffs shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 23, 2021

HON. JOAN B. LEFKOWITZ, J.S.C.

TO: All Counsel via NYSCEF

cc: Compliance Part Clerk